Supreme Court, U.S.
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No. 97-1376

In The

Supreme Court of the United States

October Term, 1997

CITY OF FLORENCE, BOBBY JOE WINCE, THOMAS DUSING, JOHN DOLAN, RON KENNER, Boone County Sheriff, ROB REUTHE and CHRIS ALSIP,

Petitioners,

vs.

WILLIAM CHIPMAN, Administrator of the Estate of CONNI BALCK and SUSAN STEMLER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals, in deciding the issue of qualified immunity in this case under 42 U.S.C. § 1983, properly considered the overwhelming facts which Respondent placed in evidence in support of her pleadings.

2. Whether state actor liability for indirect harm in a § 1983 claim was "clearly established" in February 1994 to defeat Petitioners' claim of qualified immunity.

3. Whether decedent was in custody at a police stop for purposes of § 1983 state actor liability for harm inflicted by a third party.

4. Whether the police were "deliberately indifferent" to the constitutional interests of decedent in her life and liberty when they forced her, under threat of arrest, into a vehicle with a drunken driver, who had shortly before assaulted and threatened to kill decedent.

5. Whether the issues of custody and causation in this § 1983 action have previously been decided in a state court negligence proceeding, such that Respondent is precluded from litigating those issues herein.

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STATEMENT OF THE CASE

A. Introduction

This is an action under 42 U.S.C. § 1983 arising out of the death of Respondent's decedent, Conni Sue Black (hereinafter "Black"). She was killed when a drunken and physically abusive Steve Kritis rammed his pick-up truck into a guardrail along Interstate 75 in Northern Kentucky (just south of Cincinnati, Ohio). Kritis subsequently pled guilty to second degree manslaughter, for which he is serving a five-year prison sentence. Black's death occurred less than five minutes after Petitioners, three municipal police officers and two county sheriff's deputies, forced her, under threat of arrest, into Kritis' pick-up truck. In the district court proceedings below, Black's substantive due process claim was consolidated with the § 1983 lawsuit brought by Susan Stemler. Stemler is the lesbian, as alleged by Kritis and Petitioners, who had been driving Black home prior to Petitioners' decision to remove Black from Stemler's vehicle and require her to go with Kritis.

On July 3, 1996, the district court entered summary judgment dismissing all of Black's claims, including those against Petitioners. Two years earlier the district court had granted Petitioners' motions under Rule 12(b)(6) to dismiss on grounds of qualified immunity. However, at that time the district court had also granted Black leave to amend her complaint against Petitioners. As a consequence, on March 1, 1996, after extensive discovery the two deputies filed a motion for summary judgment. This was followed on April 5, 1996, by the police officers' motion for summary judgment. *See* Appendices A and B for copies of Petitioners' summary judgment motions. Shortly thereafter, as stated above, the district court entered summary judgment dismissing all claims. Following the district court's Rule 12(b)(6) dismissal, the Rule 56 entry of summary judgment

and Respondent's timely appeal therefrom, the Sixth Circuit Court of Appeals reviewed Black's detailed allegations and the entire record evidence, which it cogently summarized in its opinion of October 8, 1997. Reversing in part, the Court of Appeals reinstated Black's substantive due process claim against Petitioners, as well as Stemler's equal protection claim against Petitioners. *See* the opinion reported in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

After reviewing the pleadings and record facts in the light most favorable to Respondent, the Sixth Circuit concluded that the two sheriff's deputies and three police officers acted with deliberate indifference in violating Black's clearly established liberty interests. Further, the court found that Black was in custody at the time Petitioners violated her rights. As a result the Court of Appeals found that the district court had improperly dismissed her substantive due process claim for third-party harm endorsed by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). It remanded the Black and Stemler cases to the district court for trial on the merits. Petitioners are not seeking review in this Court of Stemler's equal protection claim.

Contrary to the representation in the Petition, there are no over-arching legal principles stemming from the grim and tangled facts of this case. Indeed, after copiously reciting the dispositive facts of both the Black and Stemler claims, the Sixth Circuit relied on a time-honored retinue of § 1983 cases in support of its conclusion that Petitioners had, with deliberate indifference, trampled on clearly established Fourteenth Amendment rights. As a result, the requested foray by this Court into the singular facts of this case would not result in clarifying any murky legal proposition or settling any disputed issues of law. Finally, the Sixth Circuit emphatically did not violate any principle of federal-state comity by concluding that Black was

in *DeShaney* custody when Petitioners violated her rights and that Petitioners could be held liable for her subsequent death, despite state court rulings in a companion negligence case that Black was not in state custody **AT THE TIME OF HER DEATH** and was not killed **DIRECTLY** by Petitioners. These state court tort law rulings are totally distinct from the issues germane to a § 1983 action and are on appeal to the Kentucky Court of Appeals.

B. Operative Facts

The lower court appropriately summarized in its opinion both Black's allegations and supporting deposition testimony. The opinion thus described in detail the key events leading up to, occurring in the course of, and then immediately following upon the police stop in which Petitioners arrested the suspected lesbian, Susan Stemler, and forced her passenger, Conni Black, to leave the scene with the drunken and abusive Steve Kritis. For this reason, Respondent needs only to highlight the following facts:

1. Eye-witnesses substantiated that Kritis physically assaulted and threatened Black at Willie's Saloon in the Ramada Inn in Florence, Kentucky, just shortly before the police stop.

2. An eye-witness observed Kritis chasing Stemler and Black at high speeds, with his headlights off, along the main street and side streets of Florence.

3. During the high-speed chase, an observer saw Kritis catch up to Stemler and Black at a cul-de-sac and try to force Black out of Stemler's vehicle.

4. Stemler and an independent witness informed Petitioners at the stop scene of the events at Willie's Saloon and during the chase.

5. Five police cruisers responded to the "rolling domestic" dispatch call and surrounded the Stemler and Kritis vehicles. As Kritis described the scene:

> "Yeah, man, Hawaii Five-O deal. It was like whoa. Yeah, there was a whole bunch of cops came, just blocked the road, and it was like wow."

6. During the stop Petitioners twice told Black to remain in Stemler's vehicle, but later ordered her to go with Kritis or be arrested.

7. Kritis told one officer that Stemler was a lesbian who had kidnapped his girlfriend, a phoney accusation that caught the attention of all Petitioners, who thereafter focused their investigation solely on Stemler.

8. Petitioners never asked Kritis to get out of his truck despite his criminal behavior that night and his obvious intoxication.

9. The officer in charge, Lt. Dusing, falsified his official report of the stop by denying that he smelled alcohol on Kritis, contrary to what he told a witness at the scene, retired Florence Police Officer William Minnick.

10. Despite their acknowledgment that Stemler was in a panic over the events leading up to the

stop and only slight evidence of alcohol consumption, Petitioners arrested Stemler and subsequently falsified evidence in her DUI prosecution, which nevertheless resulted in her acquittal.

11. Shortly after Black's death, Kritis was arrested by Kenton County officers who testified that he was obviously intoxicated.

12. Kritis had consumed no alcohol from the time of the initial stop by Petitioners until his arrest several hours later.

These facts and those additional facts recited in the lower court's opinion substantiate that Black was deprived of her liberty by Petitioners who, with deliberate indifference, placed her in a position of imminent threat of harm.

REASONS FOR DENYING THE WRIT

I.

DEPRIVATION OF LIBERTY

The court below properly concluded that Petitioners deprived Black of her liberty by forcing her into the vehicle of a drunken and abusive assailant such that Petitioners are liable for the resulting third-party harm under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). This Court emphatically declared in that case that the state's "affirmative duty to protect arises . . . from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200. It is the deprivation of liberty which triggers the protections of the Due Process Clause, this Court stated, not the failure to

prevent harm inflicted by a third party. *Id.* Thus, it is irrelevant that Black was killed only after her liberty interests were violated. Her death was a direct and immediate consequence of the unconstitutional deprivation.

In the case at hand there was an indisputable deprivation of liberty when Petitioners forced Black into Kritis' truck, despite her incapacitated condition, despite knowing that Kritis had physically assaulted and threatened her life a short time earlier, despite Kritis' obvious intoxication and despite Kritis' menacing conduct of chasing Black at high speeds without headlights, the conduct which precipitated the police stop in question. As stated by the lower court:

> Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis' truck. Because we, unlike the District Court, believe that any uncertainty at the margins of the *DeShaney* test is not relevant to Black's claim, we hold that the defendants should have known under clearly established law that they owed Black a duty not to force her into harm's way.

Stemler v. City of Florence, 126 F.3d at 868-69.

Without question, the police stop that night was a Fourth Amendment seizure of Black, Stemler and Kritis. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), this Court stated:

> [W]e have long acknowledged that stopping an automobile and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief.

Id. at 436. Undoubtedly, any reasonable person detained at the police stop in question would believe he or she was not free to leave, the test for determining when detainees are under police authority. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Petitioners had the Stemler and Kritis vehicles completely surrounded with five police cruisers, their emergency lights flashing. Under established Sixth Circuit case law, this stop itself was coercive and custodial. "Moreover, the initial stop and blocking of Jones's car by three police cars established a custodial atmosphere and coercive environment." *United States v. Jones*, 846 F.2d 358, 361 (6th Cir. 1988). In addition, during the stop on two occasions Petitioners commanded that Black remain in Stemler's vehicle and then, toward the end of the stop, they required her under threat of arrest to leave the scene with Kritis. This is a deprivation of liberty under *DeShaney*, which immediately thereafter culminated in Black's death at the hands of a drunken and abusive driver.

II.

QUALIFIED IMMUNITY

In a recent sexual assault case under 18 U.S.C. § 242, this Court declared that the "fair warning" standard in the criminal context is synonymous with the "clearly established" requirement of § 1983 case law. *United States v. Lanier*, __ U.S. __, 117 S. Ct. 1219, 1227 (1997). As the Court stated:

> The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and ultimately governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.

117 S. Ct. at 1227. The Court then made the following observation which it held applicable to both the "clearly established" and "fair warning" requirements:

> But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity though the very action in question has not previously been held unlawful. As Judge Daughtery noted in her dissenting opinion in this case, "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages (or criminal) liability."

Id. at 1227 [case citations omitted].

In rejecting Petitioners' qualified immunity defense in the case at hand, the lower court described the "clearly established" doctrine in the same fashion as this Court did in *Lanier*:

> The fact that the law may have been unclear, or even highly disputed, at the margins does not afford state actors immunity from suit where their actions violate the heartland of the constitutional guarantee, as that guarantee was understood at the time of violation. Stated differently, it is simply irrelevant that the definition of the right to substantive due process has been in flux if, under any definition found in the case law at the time, the defendants should have known in February 1994 that their actions violated that right.

Id. at 867. *See also* n.11 related to the above quote, analogizing the "clearly established" doctrine to the "facial vagueness" doctrine.

To seek relief under *DeShaney*, therefore, it is not necessary to show that, prior to February 1994, some other police officers were found liable for forcing an incapacitated woman into the vehicle of a drunken and abusive assailant, followed immediately by a severe injury or death to the hapless victim. Black need not find and evoke such fact-specific precedent. As the court below pointed out:

> The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim under law that was clearly established in 1994, and we are therefore obliged to reverse the dismissal of her complaint against the individual officers.

Stempler v. City of Florence, supra, at 870.

III.

DELIBERATE INDIFFERENCE

Petitioners are blatantly misrepresenting the Sixth Circuit's "deliberate indifference" standard of culpability. They are falsely contending that the Sixth Circuit does not understand that deliberate indifference is not, under § 1983 case law, a version of negligence liability. Petitioners' attack is twofold: a 1987 opinion of the Sixth Circuit adopted a gross negligence standard

for § 1983 liability and, secondly, a similar tort law standard is evident in the Court's current opinion from its observation that Petitioners "knew or should have known" certain facts about Kritis.

In response, the Sixth Circuit is well aware that its reliance on a gross negligence standard in *Nishiyama v. Dixon County*, 814 F.2d 277 (6th Cir. 1987) (en banc) has since been rendered obsolete by *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). *See Stemler v. City of Florence*, 126 F.3d at 869. Further, the lower court has recognized that this Court, as well as its own case law precedent, requires a finding of "deliberate indifference" in all custody cases under § 1983. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) and cases cited in *Stemler v. City of Florence*, at 870.

Secondly, the lower court's reference to what Petitioners "knew or should have known" about Kritis is not at all incompatible with the "deliberate indifference" standard of culpability. This Court commented on exactly the same "knew or should have known" language, construing it as deliberate indifference, in *Board of The County Commissioners of Bryan County v. Brown*, __ U.S. __, 117 S. Ct. 1382 (1997). Acknowledging that deliberate indifference is the requisite standard of culpability under § 1983 for municipal liability in an inadequate training case, this Court stated:

> Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action — the "deliberate indifference" — necessary to trigger municipal liability.

Id. at 1390. Likewise in the case at hand the lower court concluded that there was sufficient evidence in the record that

the police consciously disregarded the peril into which they forced Black, not because of their carelessness but because of their deliberate indifference to her life and liberty interests.

IV.

PRECLUSION OF ISSUES

Petitioners contend that Black cannot litigate custody and causation issues in this federal court proceeding because they were decided adversely in a companion state court proceeding. However, the Court can see from his opinion provided in Appendix C at 9a, that Judge Bamberger of the Boone Circuit Court did not find that Black was free of custodial restraint **at the time she was forced into Kritis' truck**. Instead, Judge Bamberger found that she was not in police custody **at the time of her death**. Respondent contends that it is irrelevant, both under state and federal law, that Black was not in police custody at the time of her death. That state law issue will be decided by a state appellate court.

Appellee police officers also contend that res judicata/ collateral estoppel apply to the "proximate cause" issue. However, a review of the opinion of Judge Bamberger of the Boone Circuit Court clearly shows that there is no such proximate cause finding. *See* Appendix C at 9a. Instead, Judge Bamberger merely held as a matter of state law that the police officers have no liability under state negligence law unless they directly killed Conni Black. This (erroneous) conclusion of state law has absolutely no bearing on the § 1983 "proximate cause" issue of state actor liability for indirect harm.

For its part the Sixth Circuit has properly concluded that Black was in custody when Petitioners violated her liberty interest. As noted in its opinion, there is no doubt that Black was in custody at the police stop:

> Under any definition of the term, Black was in the defendant officers' custody at the time she was forced into Kritis' truck.

Stemler v. City of Florence, 126 F.3d at 856. Since the issue of custody **at the time Black was forced into Kritis' truck** was not addressed or determined by the state court, and since the findings that were made are not relevant to the merits of the underlying substantive due process claim, the lower court in this case was not precluded by the doctrine of *res judicata* from rendering a finding that Black was in custody at the relevant time. With regard to the proximate cause issue, the lower court properly noted:

> The defendants have argued that Black is precluded from relitigating the findings of the Boone Circuit Court in her state-law civil suit. In awarding judgment to the defendant officers on Black's wrongful death claim, the state court held that none of the state court actors were the direct cause of the accident on the highway. *Chipman v. City of Florence*, No. 94-CI-00202 slip op. at 4 (Boone Co., Ky., Cir. Ct. Apr. 2, 1996). While those findings are entitled to preclusive effect, they are irrelevant to the merits of her substantive due process claim.

Stemler v. City of Florence, 126 F.3d at 870, n.12.

The doctrines of comity, *res judicata* and collateral estoppel come into play in a § 1983 action only where the state court has resolved the precise question at issue. Thus in *Allen v. McCurry*, 449 U.S. 90 (1980), the Missouri state court had earlier resolved, in a criminal proceeding, the exact search and seizure issues which the plaintiff subsequently attempted to litigate in his § 1983 damages lawsuit. In order to prevail on

his § 1983 claim, the federal court would have had to reach a decision that the search and seizure was unlawful, a finding that would have been in direct conflict with the state court's finding in the earlier suppression hearing. In stark contrast, in the case at hand, there is no such dilemma. The lower court's finding that Black was in custody at the time she was forced into Kritis' truck does not in any way contradict Judge Bamberger's finding that she was not in custody several minutes later at the time of her death. Likewise, the lower court's finding that Petitioners' deprivation of Black's substantive due process rights may expose them to liability for third-party harm under *DeShaney* does not in any way contradict Judge Bamberger's finding that Steve Kritis, not Petitioners, directly killed Conni Black. In sum, the legal doctrines invoked by Petitioners are valid, but are in no way applicable to the limited rulings of the state court judge in this instance.

CONCLUSION

Insofar as Petitioners did file Rule 56 motions for summary judgment, as well as Rule 12(b)(6) motions to dismiss, they misrepresented the course of the proceedings in the district court. Thus the appellate court did properly consider both the pleadings and the record evidence in reviewing the propriety of the district court's rulings. Petitioners also misrepresented the appellate court's approach to the "deliberate indifference" issue. Thus the lower court emphatically did not convert the deliberate indifference standard into a tort standard of culpability, but instead construed it exactly as this Court did in *Board of The County Commissioners of Bryan County v. Brown*, *supra*, at 1390. Thirdly, Petitioners misrepresented the nature of the state trial court's rulings on the issues of custody and causation. For this reason, Respondent has provided the entire state court opinion to dispel the confusion shown by Petitioners on this issue.

With the record of this case thus clarified, it should be evident that well-established § 1983 case law fully supports the lower court's application of this case law to the thicket of vile facts that culminated in Conni Black's death.

Respectfully submitted,

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APPENDIX A — MOTION FOR SUMMARY JUDGMENT DATED MARCH 1, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON
CASE NO. 94-62

WILLIAM CHIPMAN, Administrator of the Estate of Conni Black

PLAINTIFF

vs.

CITY OF FLORENCE, BOBBY JOE WINCE, JOHN DOLAN, THOMAS DOSING, RON KENNER, ROB REUTHE, and CHRIS ALSIP

DEFENDANTS

MOTION FOR SUMMARY JUDGMENT

*** *** ***

Defendant, Ron Kenner, in his official capacity as Boone County Sheriff, Rob Reuthe, in his official capacity as Boone County Deputy Sheriff, and Chris Alsip, in his official capacity as Boone County Deputy Sheriff, by counsel, pursuant to Fed.R.Civ.P. 56, hereby move this Court for an Order granting it summary judgment. As grounds therefore, Defendant submits that there is no genuine issue of material fact and that Defendant is entitled to judgment as a matter of law.

Appendix A

Defendant incorporates by reference as if fully restated herein those facts and authorities contained in the accompanying Memorandum of Law.

Respectfully submitted,

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APPENDIX B — MOTION FOR SUMMARY JUDGMENT DATED APRIL 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
COVINGTON, KENTUCKY

CASE NO. 94-62

WILLIAM CHIPMAN, ADMINISTRATOR
OF THE ESTATE OF CONNI BLACK,

PLAINTIFF,

VS.

CITY OF FLORENCE, ET AL.,

DEFENDANTS.

MOTION FOR SUMMARY JUDGMENT

Come the Defendants, the City of Florence and Officers Dusing, Wince and Dolan, in their official capacities, and move the Court to grant summary judgment on all of Plaintiff's claims against them.

In support of their motion, the Defendants rely on the attached Memorandum.

Appendix B

Respectfully submitted,

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Appendix B

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APPENDIX C — ORDER OF THE COMMONWEALTH OF KENTUCKY, BOONE COUNTY CIRCUIT, GRANTING PARTIAL SUMMARY JUDGMENT DATED APRIL 2, 1996

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CASE NO. 94-CI-202 AND CASE NO. 94-CI-0459

WILLIAM CHIPMAN, ADMINISTRATOR
OF THE ESTATE OF CONNI BLACK,

PLAINTIFF

VS.

CITY OF FLORENCE, ET AL

DEFENDANTS

AND

SUSAN STEMLER

PLAINTIFF

VS.

CITY OF FLORENCE, ET AL

DEFENDANTS

Appendix C

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

This is a consolidated tort action arising from the death of Connie Black and the arrest of Susan Stemler on February 19, 1994. William Chipman, Administrator of the Estate of Connie Black ("Chipman") alleges negligence on the part of Defendant police officers and their governmental employers in the performance of their duties at a traffic stop at the intersection of U.S. 42 and Tanners Lane which resulted in the death of Connie Black. Susan Stemler, on the other hand, asserts claims of assault and battery, malicious prosecution, abuse of process, false arrest and imprisonment, and outrage as a result of her arrest for DUI and her subsequent acquittal. Having completed extensive discovery, the matter is now before the Court on Defendants' Motions for Summary Judgment.

It is undisputed that on the evening of February 18, 1994, Connie Black, Steven Kritis and Susan Stemler were patrons at Willie's Tavern in Florence, Kentucky. All of the parties consumed alcoholic beverages. When Willie's closed Black left with Stemler in her car and Kritis followed. Kritis chased them through residential streets near the Ramada Inn, at one point blocking them in the driveway at the home of William Minnick, a retired Florence Police Sergeant. The chase continued until the vehicles ultimately reached the intersection of U.S. 42 and Tanners Lane where Lt. Tom Dusing was flagged down. Stemler told Dusing all of the events that occurred at Ramada Inn and that Kritis had followed her and rammed her vehicle.

Florence Officer Bobby Joe Wince arrived on the scene and was assigned the task of handling Stemler. Upon speaking to Stemler, Officer Wince noted the odor of alcohol, conducted

field sobriety tests, administered a PBT test (which read .105), and obtained an admission from Stemler that she had consumed alcoholic beverages.

Based upon the above, Officer Wince decided to arrest Stemler for DUI. Stemler was handcuffed by Officer Wince. Stemler was transported to St. Luke Hospital in Florence where a blood sample for alcohol analysis was drawn. She was then transported to Boone County Jail.

Deputy Sheriff Ruthe, Officer Wince and Lt. Dusing all spoke to Kritis. Based on the totality of the circumstances, they decided not to arrest Kritis.

It was apparent to the officers that Black was intoxicated. The officers discussed whether to arrest Black for public intoxication or allow her to leave with Kritis. Black was allowed to get into Kritis' truck and leave the scene. Shortly after leaving the scene, Kritis and Black were involved in an accident on I-75 in Erlanger, Kentucky in which Kritis' truck struck the guardrail. Connie Black died as a result of the accident.

As a result of the accident on I-75, Kritis was charged with Manslaughter, Second Degree, and Wanton Endangerment, First Degree. He eventually pled guilty to Reckless Homicide.

Appropriateness of Summary Judgment

The parties have filed extensive briefs on the question of summary judgment accompanied by affidavits and counter-affidavits. These have been considered by the Court together with the pleadings, numerous depositions and discovery materials in the record. Based upon this review, the Court must

conclude that, although there are numerous disputes with respect to ancillary facts, except as hereinafter noted, there exists no genuine issue with respect to the facts material to the legal principles supporting the summary judgment granted herein, *Steelvest v. Scansteel Service Center*, Ky., 807 S.W.2d 476 (1991).

The Chipman Claim — Case No. 94-CI-00202

With respect to Chipmans's wrongful death claim, the court finds that the decisions in *Ashby v. City of Louisville*, Ky. App., 841 S.W.2d 184 (1992) and *Fryman v. Harrison*, Ky., 896 S.W.2d 908 (1995) are controlling. An actionable claim of negligence depends on the existence of the duty, and, unless a "special relationship" existed, there was no duty owing by any of the Defendants to Connie Black to protect her from crime. For a special relationship to exist two conditions are mandatory: (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury-producing violent act occurred and, (2) the violence or other offensive conduct must have been perpetrated by a state actor. *Ashby v. City of Louisville*, Supra. Neither of these conditions can be found in the undisputed material facts of this case. There is no evidence from which it can be concluded that Black was in custody or restrained by the state at the time the pick-up struck the guardrail. Further, there is no evidence to support a claim that the conduct which caused the pick-up to leave the roadway and strike the guardrail was perpetrated by any of the Defendants or any other "state actor".

For these reasons, Defendants' Motions for Summary Judgment are sustained.

Appendix C

The Stemler Claims — Case No. 94-CI-459

Assault and Battery

With respect to the assault and battery claim of Stemler, the Court finds that there is a genuine issue of material fact with respect to the force used by Wince in arresting her and to that extent, Defendants' Motion for Summary Judgment is overruled. However, as to Doland and Dusing, they are entitled to judgment as a matter of law on this claim since it is undisputed that they were not involved in the physical arrest or handcuffing of Stemler.

Malicious Prosecution, False Arrest and Imprisonment

Stemler was twice tried on the DUI charge in Boone District Court. The first trial resulted in a hung jury and the second trial resulted in acquittal. The existence of probable cause for Defendants to arrest Stemler for DUI is fatal to their claim for malicious prosecution. *Broaddux v. Campbell*, Ky. App., 911 S.W.2d 281 (1995); *Raine v. Drasin*, Ky., 621 S.W.2d 895 (1981); *Kirk v. Marcum*, Ky. App., 713 S.W.2d 481 (1986). The Defendants are police officers and therefore there is no distinction between Stemler's claim of false arrest and false imprisonment. *Lexington-Fayette Urban County Govt. v. Middleton*, Ky. App., 555 S.W.2d 613 (1977). The existence of probable cause to arrest Stemler for DUI is similarly fatal to the false arrest-false imprisonment claim. *McCray v. City of Lake Louisville*, Ky., 332 S.W.2d 837 (1960).

There are no genuinely disputed material facts relating to the question of probable cause for the arrest of the Plaintiff, Stemler. Stemler stated at the scene that she had consumed

alcohol, she had the smell of alcohol on her person, her performance on the field sobriety tests and her preliminary breath best result of .105 certainly constitutes probable cause. *Allen v. Commonwealth*, Ky. App., 817 S.W.2d 458 (1991).

Further, in the process of Stemler's DUI trials, Boone District Judge, Charles Moore, made a specific finding of the existence of probable cause in overruling Stemler's motion to dismiss the charges at the conclusion of the prosecution case and by overruling Stemler's pre-trial motion to suppress evidence. A specific finding of probable cause in the underlying criminal action precludes a malicious prosecution action. *Broaddus v. Campbell*, supra. Defendants' Motions for Summary Judgment with respect to the claims of malicious prosecution, false arrest and false imprisonment are sustained.

Abuse of Process

The elements of a claim for abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in regular conduct of the proceeding. *Mullins v. Richards*, Ky. App., 705 S.W.2d 951 (1986), *Bonnie Braes Farms, Inc. v. Robinson*, Ky. App., 598 S.W.2d 765 (1980).

In responding to Defendants' Summary Judgment Motion, Stemler has the burden to identify evidence which presents a genuine issue of material fact supporting her claim. Stemler has identified no such evidence.

Further, it is undisputed that Assistant Attorney General Larry Fentress, Special Prosecutor in the Stemler DUI trials, controlled the cases and independently made the prosecutorial decisions.

Appendix C

Defendants' Motion for Summary Judgment on the claim of abuse of process is sustained.

Intentional Infliction of Emotional Distress: Outrage

Plaintiff's claim of intentional infliction of emotional distress/outrage is controlled by the holding in *Rigazio v. Archdiocese of Louisville*, Ky. App., 853 S.W.2d 295 (1993). Defendants' conduct about which Plaintiff complains raises claims under the traditional torts discussed above (assault and battery, false arrest and imprisonment, malicious prosecution, abuse of process). For this reason, there is no viable action in this case for the tort of outrage.

Further, "so long as the officer's conduct is reasonable under the circumstances, he is immune from an action for intentional infliction of emotional distress regardless of the extent of the plaintiff's emotional distress and regardless of whether or not the plaintiff is convicted of the crime." *Kentucky Jurisprudence*, Torts, Section 11-8 p. 317. Defendants' Motion for Summary Judgment on the question of intentional infliction of emotional distress is sustained.

Accordingly, **IT IS HEREBY ORDERED AS FOLLOWS:**

1. That Defendants' Motion for Summary Judgment on all claims asserted by Chipman in Case No. 94CI-00202 is granted since there is no genuine issue of a material fact and Defendants have demonstrated entitlement to judgment as a matter of law, and that action is hereby dismissed with prejudice;

2. Defendants' Motion for Summary Judgment in Case No. 94-CI-459 on Stemler's claim of assault and battery is denied

as to Defendants' Wince and the City of Florence since there are issues of material fact; and,

3. Defendants' Motion for Summary Judgment in Case No. 94-CI-459 on Stemler's claim for assault and battery against Defendants Dusing and Dolan is granted and Defendants Motion for Summary Judgment on the remainder of Stemler's claims in that action against all Defendants is granted, since there is no genuine issue of a material fact and Defendants have demonstrated entitlement to judgment as a matter of law, and that action is, with the exception of the assault and battery claim against Defendants Wince and the City of Florence, dismissed with prejudice.

In light of the above ruling, the Court orders as follows:

a) That the Plaintiffs file with the Court and serve by hand delivery or fax upon opposing counsel a list of witnesses and a brief summary of their anticipated testimony by 3:30 p.m., April 12, 1996.

b) That the Defendants file with the Court and serve by hand delivery or fax upon opposing counsel a list of witnesses and a brief summary of their anticipated testimony by 3:30 p.m., April 15, 1996.

c) That the Pre-trial Conference previously scheduled for April 8, 1996 is re-scheduled for April 19, 1996 at 9:00 a.m.

All Motions in Limine shall be filed with the Court no later than April 17, 1996 and a copy served on opposing counsel by hand or fax no later than April 17, 1996 at 3:30 p.m.

Appendix C

SO ORDERED this the 2 day of April, 1996.

/s/JUDGE JOSEPH F. BAMBERGER
JUDGE JOSEPH F. BAMBERGER
BOONE CIRCUIT COURT

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